Re P Suppiah, (Tara Rajaratnam, Judgment Creditor)

HIGH COURT (JOHORE BAHRU) – BANKRUPTCY NO 43-773 OF 1987
LC VOHRAH J
2 MAY 1989

Civil Procedure – Costs – Privy Council appeal – Costs taxed in London – Payment made in Malaysia – Exchange rate fluctuations – Whether to apply rate prevailing on date costs taxed or on date costs paid – Interest on costs – Whether payable – Rules of the High Court, O 42 rr 7 & 12

The judgment debtor was an appellant in a Privy Council appeal in which the judgment creditor was the respondent [see [1986] 1 MLJ 105]. The appeal was dismissed on 10 December 1985 and the appellant was ordered to pay costs which when taxed in London on 14 February 1986 amounted to £17,618.83. Following disagreement between the parties as regards the amount payable in Malaysian currency, the judgment debtor made payment into court and the judgment creditor filed in court on 19 October 1987 a request for the issue of a bankruptcy notice. The bankruptcy notice was issued and served on the judgment debtor. The total amount demanded was $84,020.16 made up as follows:

(i)	Costs of Privy Council appeal (£17,618 @ the exchange rate of $4.20 to £1 on 19 October 1987)	$74,069.56
(ii)	Interest on $74,069.56 @ 8% pa from 14 February 1986 to 19 October 1987	$ 9,950.66

The judgment debtor replied that he would pay only the sum of $61,789.24 being the equivalent of the taxed costs based on the exchange rate of $3.507 to the pound prevailing on 14 February 1986. He applied for an order to set aside the bankruptcy notice substantially on two grounds, namely:

(i) that the exchange rate for the conversion from sterling to ringgit should have been that prevailing on 14 February 1986 when the costs were actually taxed; and

(ii) that the judgment creditor was not entitled to interest claimed on the costs amounting to M$74,069.56 at the exchange rate of $4.204 to £1 prevailing on 19 October 1987 when payment was made by the judgment debtor.

Held, dismissing the application :

(1) Having regard to the continuing monetary trend, the court would favour the date of payment as the choice of the judgment debtor and he was to pay either the exact amount in sterling as taxed or the equivalent in Malaysian currency at the time of payment. The delay in payment by the judgment debtor should not have the effect of causing the judgment creditor any financial loss or imposing upon her any currency risk. Accordingly the judgment creditor was fully entitled when filing the bankruptcy notice to utilize the rate of exchange of £1 to $4.204 prevailing on 19 October 1987 when, it was common ground, payment of the costs was made by the judgment debtor instead of the rate of exchange prevailing on 14 February 1986 when the costs were actually taxed in London.

(2) The order for costs formed part of the judgment of the Privy Council and payment of the costs could be enforced in the same manner as any judgment for the payment of money which the Privy Council may give. The judgment of the Privy Council must be enforced or executed in the same way as that of the Federal Court.

(3) The Rules of the Federal Court 1980 do not make any specific provisions with regard to the payment of interest but in view of r 4 thereof recourse has to be made to O 42 r 12 of the Rules of the High Court 1980 which provides that interest is to be calculated from the date of judgment until the judgment is satisfied.

(4) The judgment creditor had not asked for interest on the costs from the date of the judgment as she would seem entitled to but only from the date of taxation, a date which the court preferred as being more reasonable. Accordingly the court could see no objection to the judgment creditor quantifying the interest on the costs from the date of taxation to the date of payment of the costs by the judgment debtor.

Cases referred to

1 *Schorsch Meier GmbH* v *Hennin* [1975] QB 416 (refd)
2 *Miliangos* v *George Frank (Textiles) Ltd* [1975] 3 All ER 801 (refd)
3 *Liau Kim Lian* v *Bajuria* [1971] 1 MLJ 276 (refd)
4 *K* v *K* [1977] 1 All ER 576 (refd)

Legislation referred to

Courts of Judicature Act 1964, ss 76(1), 77, 78
Courts of Judicature (Amendment) Act 1984
Rules of the Federal Court 1980 r 4
Rules of the High Court 1980 O 42 rr 7, 12, O 67 r 3(2)
Rules of the Supreme Court 1957 O 40 r 11(2)
Treaty of Rome art 106
Judgment Act 1838 [UK] ss 17, 18
Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982 No 1676) [UK] r 75

S Naicker for the judgment creditor.
Judgment debtor in person.

Cur Adv Vult

LC Vohrah J: This is an application on the part of the judgment debtor for an order that the bankruptcy notice served on him be set aside on the ground that it was bad in law. The facts in so far as they are relevant to this application are as follows. The judgment debtor who is an advocate and solicitor was one of the appellants (defendants) in Privy Council Civil Appeal No 39 of 1983 whilst the judgment creditor was the respondent (plaintiff) [see [1986] 1 MLJ 105]. The appeal was dismissed on 16 December 1985 and the costs which were awarded to the judgment creditor were taxed in London on 14 February 1986 and amounted to £17,618.83. On 24 September 1987 the solicitors for the judgment creditor wrote to the judgment debtor requesting payment of the Malaysian equivalent of the taxed costs within 48 hours of receipt and stating that if the judgment debtor should fail to comply they had instructions to file a bankruptcy notice against him (see encl 3, exh PS1). On 7 October 1987 the judgment debtor's firm replied to this notice and to subsequent letters from the solicitors for the judgment creditor informing them that he would be sending a cheque of M$61,789.24 on 11 October 1987 based on the exchange rate prevailing at the date when the costs were taxed in London and enquiring as to the name in whose favour the cheque ought to be made out (see encl 3, exh

PS2). On 8 October 1987 the solicitors for the judgment creditor replied that the rate of exchange should be M$4.16 at the 'present (7 October 1987) exchange' as the judgment debtor could have paid the costs on 14 February 1986 but had 'neglected and failed to do so until now...'. They also asked for interest at 8% pa from 14 February 1986 up to the date of payment and intimated that if the dispute as to the exchange rate could not be resolved, the sum of M$61,789.24 was to be paid to them on or before 11 October 1987 (see encl 3, exh PS3). The judgment debtor's firm then wrote the following letter:

> 10 October 1987
> Messrs Subra Naicker & Co,
> Advocates & Solicitors,
> Johore Bahru.
>
> Dear Sirs,
>
> Re: Privy Council Civil Appeal No 39/83
> Taxed Costs (£17,618.83)
>
> We thank you for your letter dated 8 October 1987.
>
> There was no demand made on 14 February 1986 and if you had demanded for the sum of £17,618.83 on that day payment would have been made and if payment was not made only then your argument that the present date is to be taken for the exchange rate will apply. Similarly we do not know whether costs in England carry interest. Even if it did we are of the view that interest if at all would run only after a demand has been made for payment. We want your views on these matters before we send you the sum that we say is due to your client. Our clients will decide in whose name the amount is to be sent.
>
> Please let us have your reply forthwith.
>
> We wish to state that we reserve our legal rights to oppose any action that you wish to take on the matter.
>
> Yours faithfully,
> Sgd:

The solicitors for the judgment creditor responded as follows:

> Tarikh: 18 October 1987.
> M/s P Suppiah & Co,
> Advocates & Solicitors,
> 2D, Jalan Wong Ah Fook,
> 80000 Johor Bahru.
>
> Dear Sirs,
>
> Re: Privy Council Appeal No 39 of 1983
>
> We refer to your letter of 10 October 1987.
>
> Your Mr P Suppiah would no doubt recall that soon after the taxation in London, our Mr Subra Naicker spoke to your Mr P Suppiah at the High Court premises on that matter and your Mr P Suppiah said 'No problem; as soon as the exact figures are known we will forward the same to you.' On that basis, we left the matter there in the belief that you will forward to us the sums involved in due course.
>
> Now, as expected, you are throwing in all sorts of lame excuses to cover the fact that you are unable or unwilling to pay up as required – including saying that your client will decide to whom to send the taxed costs. With respect, who does your client think he is to contend and dictate contrary to Rule 42 of the Leqal Profession (Practice and Etiquette) Rules 1978 which provides:
>
> 'An Advocate and Solicitor not to communicate with a person represented by another advocate and solicitor; An advocate and solicitor shall not communciate with a person upon any matter in respect of which to his knowledge that person is represented by another advocate and solicitor except with the other's express consent.'
>
> As far as we are concerned it makes hardly any difference as to whom (whether to us or to our clients) the taxed costs are sent so long as they are sent; except that your dubious and absurd suggestions make it appear that we are dealing with people who are in fact less than lawyers.
>
> We now require you to forward to us the taxed costs without further ploys – as your own dateline of 11 October 1987 as contained in your letter of 7 October 1987 has long expired.
>
> Yours faithfully,
> Sgd:

The sequel to this exchange of correspondence was the payment into court of 'a huge disputed sum' on 19 October 1987 and the filing of the request for issue of the bankruptcy notice dated 20 October 1987 to which was exhibited the order under s 76(1) of the Courts of Judicature Act 1964 dated 30 August 1986 wherein it was stated that the sum of £17,618.83 had to be paid. The bankruptcy notice was issued on 26 October 1987 and served on the judgment debtor on 1 November 1986 and it demanded payment by the judgment debtor within seven days after service of notice excluding the day of service of two sums as follows:

(a)	Costs of Privy Council appeal (£17,618.83 @ the exchange rate of M$4.20 to £1 as on 19 October 1987.)	$74,069.56
(b)	Interest on $74,069.56 @ 8% pa from 14 February to 19 October 1987	$9,950.60
		$84,020.16

In response, the judgment debtor on 7 November 1987 intimated he would send only the sum of M$61,789.24 being the equivalent of the taxed costs of £17,618.83 based on the exchange rate of M$3.507 to the pound prevailing on 14 February 1986. The difference between this sum and the sum demanded amounting to M$22,230.92 is made up of the sum of M$12,280.32 representing (1) the difference in the exchange rates prevailing on 14 February 1986 (the date of the taxation) and 19 October 1987 (the date of payment by the judgment debtor) and (2) the interest of M$12,280.32 at the rate of 8% on the sum of M$74,069.56 from 14 February 1986 to 19 October 1987.

In his arguments to set aside the bankruptcy notice the judgment debtor has proceeded substantially on two grounds, namely:

(1) that the exchange rate for the conversion from sterling to ringgit should have been that prevailing on 14 February 1986 when the costs were actually taxed; and

(2) that the judgment creditor is not entitled to the interest of 8% per annum claimed on the costs amounting to M$74,069.56 at the exchange rate of M$4.204 to £1 prevailing on 19 October 1987 when payment was made by the judgment debtor.

As regards the first ground, what I understand the judgment debtor to say is this: since the costs were taxed in England they were enforceable in England and would have been paid in sterling if demand had been made forthwith for the costs, but since the solicitors for the judgment creditor chose to enforce the costs in Malaysia, they were not entitled to ask for the Malaysian equivalent at the rate of exchange prevailing on the date of the demand, well past the date of taxation since the value of the pound has gone up from M$3.507 to M$4.204 during the intervening period. In support of this argument the judgment debtor referred to O 67 r 3(2) of the Rules of the High Court 1980 relating to the reciprocal enforcement of judgments which provides that where the sum payable under a judgment sought to be registered is expressed in a currency other than the currency of Malaysia, the affidavit must also state the amount which that sum represents in the currency of Malaysia calculated at the rate of exchange prevailing at the date of judgment. Counsel for the judgment creditor in reply however argues that O 67 does not apply to a judgment of the Privy Council in respect of which the costs have been awarded. I agree because O 67 relates to the enforcement of a judgment of a superior court of any country or territory outside Malaysia including the United Kingdom called a 'reciprocating country' to which the Act applies as specified in the First Schedule. In other words it relates to a judgment of a foreign court of a status equal to that of our local High Court. The Judicial Committee of the Privy Council until the abolition of appeals to it from the then Federal Court was the final Court of Appeal and formed part and parcel of the Superior Courts of Judicature of Malaysia. I accept the argument of counsel for the judgment creditor that a reasonable and practical approach must be adopted in order to prevent unfairness to the judgment creditor. Two authorities have been cited to me by counsel for the judgment creditor as a guide to determine the appropriate date of conversion for the payment of a judgment sum expressed in a foreign currency, namely *Schorsch Meier GmbH* v *Hennin*[1] and *Miliangos* v *George Frank (Textiles) Ltd.*[2] In the first case the plaintiff company was a dealer in motorcar parts and accessories. It had offices and workshops in Munich in the Federal Republic of Germany. The defendant lived in England and was engaged in the motorcar trade. In 1970 and 1971 he ordered spare parts and accessories from the plaintiff company. Some of the orders he gave himself when he called at the plaintiff company's offices at Munich. Other orders he gave by telephone from England. The plaintiff company invoiced the goods to him, giving the price in Deutschmarks, and despatched them to him in England. He made some payments in cash when he was in Munich. He made those payments in Deutschmarks. He also gave two cheques in sterling but they were dishonoured. The plaintiff company then rendered a statement of account to him for DM3,756.03 for goods sold and delivered. The currency of the contract was clearly German. At the time when the sum became due the rate of exchange was £1 to DM8.30. At that rate the sterling equivalent was £452. Some time later sterling was devalued and £1 was only worth DM5.85. The plaintiff company issued a summons in the West London county court for the sum of DM3756.03 and proved the debt in Deutschmarks and, relying upon art 106 of the Treaty of Rome, asked for judgment in Deutschmarks contrary to the rule of English law by which an English court could give judgment only in sterling. The court refused to give judgment in Deutschmarks whereupon the plaintiff company appealed. In allowing the appeal, the Court of Appeal held, inter alia, that art 106 required the English court, as the national court of a member state, to give judgment for a creditor residing in another member state in his own currency where it was the currency of the contract; that it would be contrary to the spirit and intent of the Treaty to make a creditor in a member state accept judgment against a defaulting English debtor in depreciated sterling; and that accordingly the rule that an English court could give judgment only in sterling no longer applied. Lord Denning said at p 425:

> It is perfectly legitimate to order the defendant to pay the German debt in Deutschmarks. He can satisfy the judgment by paying the Deutschmarks; or, if he prefers, he can satisfy it by paying the equivalent sum in sterling, that is, the equivalent *at the time of payment*. (emphasis added).

In the second case, the plaintiff, a national of Switzerland, by an agreement made in May 1971, agreed to sell, and the defendant, an English company, agreed to buy, a quantity of polyester yarn. The proper law of the contract was Swiss law and the money of account and payment was Swiss francs. The yarn was produced by the plaintiff in Switzerland and delivered to the defendant in the autumn of 1971 under five invoices, each of which stated the price in Swiss francs, payment to be made within 30 days to a Swiss bank. The defendant did not pay any part of the price. On 20 April 1972 the plaintiff issued a writ claiming payment of the sterling equivalent of the contract price at the date when payment should have been made. Between that date and the date of the hearing of the action sterling fell in value against the Swiss franc with the result that, at the date of the hear-

ing, the contract price in Swiss francs was equivalent to a much larger sterling sum than it had been in 1971. Accordingly, at the hearing, the plaintiff obtained leave to amend the statement of claim so as to claim the amount due to him in Swiss francs. The defendant did not dispute liability but contended that the plaintiff was not in law entitled to judgment for a sum of money expressed in a foreign currency. It was held that where a plaintiff brought an action for a sum of money due under a contract he was entitled to claim and obtain judgment for the amount of the debt expressed in the currency of a foreign country if the proper law of the contract was the law of that country and the money of account and payment was that of the same country. If it was necessary to enforce the judgment that amount was to be converted into sterling at the date when leave was given to enforce the judgment. It followed that the plaintiff was entitled to an order that the defendant should pay him the sum due in Swiss francs or the sterling equivalent at the time when leave was given to enforce the judgment. Lord Fraser had this to say at p 841:

> I think that a party suing for recovery of a debt due in a foreign currency should be entitled to claim payment of, and to get judgment for, the amount of the debt expressed in the foreign currency.
>
> But there must be some provision for converting the foreign currency into sterling so that it can be enforced in this country. The question is what the conversion date should be. *Theoretically, it should, in my opinion, be the date of actual payment of the debt. That would give exactly the cost in sterling of buying the foreign currency.* But theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement. Accordingly, I agree with my noble and learned friend that conversion should be at the date when the court authorises enforcement of the judgment in sterling. (Emphasis added).

Although these two cases concern international contracts, the trend has been for courts 'to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so.' In the present case having regard to the continuing monetary trend I would favour the date of payment as the choice of the judgment debtor is to pay either the exact amount in sterling as taxed or the equivalent in Malaysian currency at the time of payment. The delay in payment by the judgment debtor should not have the effect of causing the judgment creditor any financial loss or imposing upon her any currency risk. Accordingly it is my considered view that the judgment creditor was fully entitled when filing the bankruptcy notice to utilize the rate of exchange of £1 to M$4,204 prevailing on 19 October 1987 when it was common ground, payment of the costs was made by the judgment debtor instead of the rate of exchange prevailing on 14 February 1986 when the costs were actually taxed in London.

In regard to the second ground the judgment debtor states that the rules set out in Sch II to the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (SI 1982 No 1676) under which the costs were taxed by the Registrar of the Privy Council specifically under r 75 do not provide for interest and unless there is specific statutory provision for interest to be paid no interest is payable on the costs that have been taxed. I do not agree. As the appeal was pending before the Privy Council prior to the coming into force of the Courts of Judicature (Amendment) Act 1984 on 1 January 1985, s 77 of the Courts of Judicature Act 1964 would apply in the present case. That section reads:

> Any person who desires to enforce or obtain execution of any order of the Yang di-Pertuan Agong shall file in the Federal Court a certified copy of the order which shall be enforced or executed in the same way as is enforced or executed a judgment of the Federal Court.

As the propriety of the order of the Yang di-Pertuan Agong is not in issue, the judgment of the Privy Council must be enforced or executed in the same way as that of the Federal Court. Section 78 specifically provides for costs incurred in the prosecution of any appeal to be stipulated in the order of the Yang di-Pertuan Agong on the recommendation of the Judicial Committee of the Privy Council and it stands to reason, in the absence of any specific provision to the contrary, that the costs which have been specified in the order form part of the judgment of the Privy Council and can be enforced in the same manner as any judgment for the payment of money which the Privy Council may give. The Rules of the Federal Court 1980 (now renamed the Rules of the Supreme Court 1980) do not make any specific provisions with regard to the payment of interest but r 4 states:

> Where no other provision is made by any written law or by these rules the procedure and practice in the Rules of the High Court 1980 shall *mutatis mutandis* apply.

Accordingly recourse has to be made to the Rules of the High Court, O 42 r 12 of which provides:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

The date from which a judgment is to take effect is provided for in O 42 r 7 which reads:

> (1) A judgment or order of the Court takes effect from the day of its date.
>
> (2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

The Federal Court (as it then was) had occasion to determine the question as to whether interest was chargeable

on the amount of costs awarded against a party to an action where there had been delay in payment under the Rules of the Supreme Court 1957 (the predecessor of our present Rules of the High Court 1980) in *Liau Kim Lian* v *Bajuria*.[3] The rule that was under consideration was 11(2) of O 40 which reads:

> Every judgment for the payment of money shall bear interest at the rate of six per cent per annum.

Gill FJ (as he then was) had this to say at p 277:

> The view which we took of the matter was that upon a true construction of O 40 r 11(2) interest is payable where an order directs payment of costs to be taxed. It is to be observed that O 40 r 11(2) speaks of 'every judgment for the payment of money'. The word 'judgment' is defined in s 2 of the Debtors Ordinance 1957 to include 'any decree, order or decision for the payment of money'. Where there is an order for costs, it is enough if the amount of the costs is ascertained on the successful party's bill of costs being taxed by a proper officer of the court, as after taxation a further order for the payment is not necessary. Indeed, an order for payment of costs is tantamount to an order for the payment of such amount of money as may be ascertained on taxation to be the amount of the costs to which the successful party is entitled. To a very large extent, it is similar to a judgment for damages to be assessed. A judgment for damages to be assessed, or for costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation (see 22 *Halsbury's Laws of England* (3rd Ed) p 782, para 1662).
>
> For the reasons stated, we allowed this appeal but made no order as to costs. This meant that it would be open to the judgment creditor to enforce payment of the amount due as interest on costs, if he so wished.

In the case of *K* v *K (divorce costs: interest)*[4] the husband by an order of the High Court dated 17 May 1974 was ordered to pay a lump sum to the wife and to pay the wife's costs of the application for ancillary relief. Those costs had been incurred partly in the county court and partly in the High Court. In October 1974 the wife's solicitors lodged for taxation a bill of the costs incurred in the county court and High Court in respect of the ancillary proceedings which amounted to over £34,000. On taxation of the bill the costs were reduced and quantified at £16,651. On 18 August 1975 the registrar ordered the husband to pay those taxed costs within 28 days. The husband paid them on 1 September. The wife claimed interest on the taxed costs from the date of the order for costs, ie 17 May 1974 until the date when costs were paid. It was held, inter alia, that although by the Judgments Act 1838 s 17 a judgment debt carried interest from the time a judgment was entered and, by s 18 of that Act, an order whereby costs were payable was to have the effect of a judgment, the modern practice was that interest on costs ran only from the date when the costs had been quantified, or from the time fixed for payment of the quantified costs. Lord Denning had this to say at p 580:

> [W]e are entitled to apply a little commonsense. Interest should be payable whenever money is 'wrongly withheld' from the one who is entitled to it ... When the sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. He cannot be said to be 'wrongfully withholding' the money until it is fixed. So in all fairness interest should only run from the date of quantification.

In the present case the judgment creditor has not asked for interest from the date of the judgment as she would seem entitled to on the authority of *Liau Kim Lian's* case[3] but only from the date of taxation, a date which I prefer as being more reasonable. Accordingly I can see no objection to the judgment creditor quantifying the interest on the costs from the date of taxation to the date of payment of the costs by the judgment debtor. In the result the application is dismissed with costs.

Application dismissed.

Solicitors: *Subra Naicker & Co.*

Reported by *PS Ranjan*

Abdul Khoder bin Shafie v Low Yam Chai

HIGH COURT (ALOR SETAR) – CIVIL APPEAL NO 12-03-1987
KC VOHRAH J
12 APRIL 1989

Evidence – Agreed bundle of documents – Purpose – Effect of inclusion of document in bundle – Notes of proceedings in previous case included in bundle – Witness who gave evidence in previous case not called in subsequent case – Whether his previous testimony admissible in subsequent case – Use of statements by witnesses in previous case for impeachment or corroboration in subsequent case – Contradiction of witness by statement made by third party – Evaluation of evidence – Duty of court – Evidence Act 1950, ss 32, 145, 155(c) & 157

Following a highway collision, the plaintiff brought a negligence action for damages in the sessions court against the defendant, alleging that the defendant in his car had negligently encroached into the plaintiff's path and collided with the plaintiff's motorcycle. The defendant's version of the collision was that the plaintiff's motorcycle had encroached into the defendant's path and collided with the defendant's car. The sessions court judge dismissed the claim following the trial. The trial judge had no sketch plan to rely on as it had not been admitted. In reaching his decision, he relied on the notes of the evidence of the investigating officer in a criminal case arising out of the accident (in which the plaintiff was the accused) conducted before a magistrate. The notes had been included in an agreed bundle of documents in the civil action.

The investigating officer was not called to testify in the civil action. No mention was made as to what was agreed upon as regards the bundle. It was conceded by counsel for both parties that the police sketch plan and key were disputed documents at the trial although they were included in the agreed